

Internal Revenue Service
memorandum

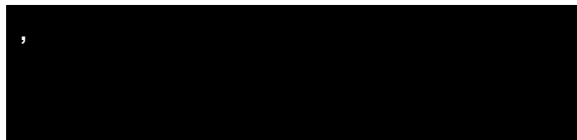
date: **AUG 28 1991**

to: Director, Internal Revenue Service Center
Kansas City, MO
Attn: Entity Control

from: Technical Assistant
Employee Benefits and Exempt Organizations

subject: CC:EE:3 - TR-45-1268-91
Railroad Retirement Tax Act Status

Attached for your information and appropriate action is a copy of a letter from the Railroad Retirement Board concerning the status under the Railroad Retirement Act and the Railroad Unemployment Tax Act of:



We have reviewed the opinion of the Railroad Retirement Board and, based solely upon the information submitted, concur in the conclusion reached by the Board that [REDACTED] is not an employer under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

(Signed) Ronald L. Moore

RONALD L. MOORE

Attachment:

Copy of letter from Railroad Retirement Board

cc: Mr. Gary Kuper
Internal Revenue Service
200 South Hanley
Clayton, MO 63105

008969

UNITED STATES OF AMERICA
RAILROAD RETIREMENT BOARD
844 RUSH STREET
CHICAGO, ILLINOIS 60611

BUREAU OF LAW

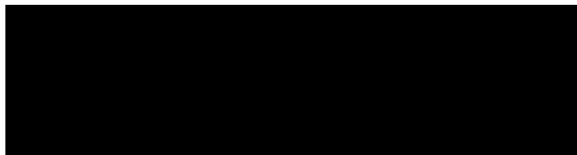
JUL 22 1991

Assistant Chief Counsel
(Employee Benefits and
Exempt Organizations)
Internal Revenue Service
1111 Constitution Avenue., N.W.
Washington, D.C. 20224

Attention: CC:IND:1:3

Dear Sir:

In accordance with the coordination procedure established between the Internal Revenue Service and this Board, I am enclosing for your information a copy of an opinion in which I have expressed my determination as to the status under the Railroad Retirement and Railroad Unemployment Insurance Acts of the following:



Sincerely yours,

A handwritten signature in cursive script, reading "Steven A. Bartholow".

Steven A. Bartholow
Deputy General Counsel

Enclosure

MEMORANDUM

JUL 17 1991

TO: Director of Research and Employment Accounts

FROM: Deputy General Counsel

SUBJECT: [REDACTED]
Employer Status

This is in reply to your Form G-215 dated April 1, 1991, requesting my opinion regarding the employer status of [REDACTED]. This company has not previously been held to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

According to a letter dated [REDACTED], from [REDACTED], President of [REDACTED], [REDACTED] "is in the business of building and repairing railroads primarily for industrial customers" and has provided "complete consultation, engineering, construction and maintenance services for industrial rail owners and the entire [rail] industry * * *" since [REDACTED]. In [REDACTED], [REDACTED] acquired a controlling interest in [REDACTED], which has recently been held to be an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. See Notice No. [REDACTED], dated [REDACTED]. According to a Notice of Exemption filed in Interstate Commerce Commission Finance Docket No. [REDACTED], decided [REDACTED], [REDACTED] also controls [REDACTED], which has also been held to be an employer under the Acts. See Notice No. [REDACTED], dated [REDACTED].

Section 1(a)(1) of the Railroad Retirement Act defines the term "employer," in pertinent part, as follows:

"The term 'employer' shall include--

"(i) any express company, sleeping-car company, and carrier by railroad, subject to part I of the Interstate Commerce Act;

"(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any

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service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * *."

Section 202.5 of the Board's regulations (20 CFR 202.5) defines a company under common control with a carrier as one controlled by the same person or persons which control a rail carrier. The Board has determined that a parent company may be under common control with its subsidiaries within the terms of this provision. See Appeal of Itel Corporation, Board Order [REDACTED], reversed on other grounds, Itel Corporation v. United States Railroad Retirement Board, 710 F. 2d 1243 (7th Cir. 1983). The absence of actual exercise of that control does not determine whether common control as provided in section 1(a)(1)(ii) exists; the right or power to exercise control is sufficient. See 20 CFR 202.4.

Based on the above, it is my opinion that [REDACTED] is under common control with a railroad employer by reason of its substantial ownership interest in [REDACTED] and its control of [REDACTED].

The question then becomes whether [REDACTED] performs a service in connection with railroad transportation. Section 202.7 of the regulations (20 CFR 202.7) defines a service as in connection with railroad transportation if it is reasonably directly related, functionally or economically, to the performance of rail carrier obligations.

Although [REDACTED] stated in his letter of [REDACTED], that [REDACTED] percent of [REDACTED]'s business is "associated with the rail industry," a letter of [REDACTED], to the Board from him clarifies that the "rail industry" referred to includes manufacturers who own trackage. He states therein that "[l]ess than [REDACTED] percent of [REDACTED]'s services are performed for Class I, Class II or Class III railroads" and that "More than [REDACTED] percent of service performed by [REDACTED] is on trackage owned by manufactur[ers] or distributors." This information is consistent with a sample list of customers previously submitted on behalf of [REDACTED] which lists about [REDACTED] companies, most of which are manufacturing companies; less than [REDACTED] of these are railroad employers.

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In his letter of [REDACTED], [REDACTED] advises that [REDACTED] "performs services as a consultant to both the [REDACTED] and the [REDACTED]. These services include accounting and assistance in maintenance of way planning and budgeting." [REDACTED] subsequently submitted information to the effect that the work performed for its affiliates in [REDACTED] represented revenues of \$[REDACTED], less than [REDACTED] percent of the total revenues generated of \$[REDACTED]. The court in Adams v. Railroad Retirement Board, 214 F.2d 534 (9th Cir. 1954), found accounting, purchasing, and stenographic services to be services in connection with railroad transportation.

Accounting and assistance in maintenance of way planning and budgeting as performed by [REDACTED] for its railroad affiliates are similar to the accounting, purchasing, and stenographic services considered in Adams, and are "reasonably directly related, functionally [and] economically, to the performance of [rail carrier obligations]." 20 CFR 202.7. Accordingly, the services performed by [REDACTED] for its affiliates may constitute service in connection with railroad transportation.

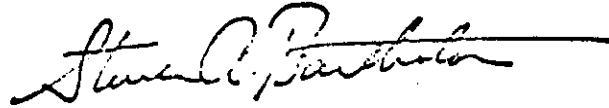
Section 202.6 of the regulations of the Board, implementing the casual service exception contained in section 1(a)(1)(ii) of the Railroad Retirement Act, quoted above, provides that:

"The service rendered or the operation of equipment or facilities by a controlled company or person in connection with the transportation of passengers or property by railroad is 'casual' whenever such service or operation is so irregular or infrequent as to afford no substantial basis for an inference that such service or operation will be repeated, or whenever such service or operation is insubstantial." 20 CFR 202.6.

Based on the information discussed above, the services provided by [REDACTED] in connection with rail transportation amount to "Less than [REDACTED] percent of [REDACTED]'s services * * *," and thus clearly constitute an insubstantial portion of the operations of [REDACTED]. On this basis, I conclude that the services being performed by [REDACTED] for its rail carrier affiliates are in any event casual, and, accordingly, it is my opinion that [REDACTED] is not an employer under the Acts. Cf. Rev. Rul. 84-91, 1984-1 C.B. 203, which held that the performance of services in connection with rail transportation was casual where the activities in question constituted less than [REDACTED] of the related company's activities.

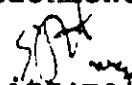
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An appropriate Form G-215 is attached.

A handwritten signature in cursive script, reading "Steven A. Bartholow", with a horizontal line extending to the right.

Steven A. Bartholow

Attachment

Handwritten initials, possibly "MCL", in cursive script.

MCLitt:mcl:cmw
0027L/C. 1056-91